

**Updated Informative Digest for the State Board of Equalization's
Adoption of Proposed Amendments to California Code of Regulations,
Title 18, Section 1603, *Taxable Sales of Food Products***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1603, *Taxable Sales of Food Products*, on March 25, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1603 without making any changes.

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on March 25, 2014, to comment on the proposed regulatory action. There have not been any changes to the applicable laws or the effect of, the objective of, and anticipated benefits from the adoption of the proposed amendments to Regulation 1603 described in the informative digest included in the notice of proposed regulatory action. The informative digest included in the notice of proposed regulatory action provides:

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

In 2001, Regulation 1574, *Vending Machine Operators*, was amended to delete the specific requirement that vending machine operators post a sign providing that their sales are made on a tax-included basis and to instead provide that sales of tangible personal property through vending machines are presumed to be made on a tax-included basis notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1603

Mobile food vendors sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts. Mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis and to round their menu prices to the nearest quarter or dollar. And, similar to the vending machine operators, mobile food vendors intend for the prices that they charge for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

While the industry practice is for mobile food vendors to include sales tax reimbursement in their menu prices, during recent audits, many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

Interested Parties Process

The Board's Business Taxes Committee (BTC) staff drafted amendments adding a new subdivision (u) to Regulation 1603 to address the mobile food vendors' signage issue. The draft amendments suggested adding provisions to the regulation to describe the term "mobile food vendors" by providing that mobile food vendors include retailers who sell food and beverage for immediate consumption from motorized vehicles or un-motorized carts, and provide that mobile food vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis, unless a separate amount for tax reimbursement is added to the price. And, the

draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a “caterer” as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013, to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors’ participation in the Board’s Offers in Compromise Program under RTC section 7093.6.

However, as explained in more detail in the initial statement of reasons, BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. And, BTC staff indicated that it was not necessary to revise the proposed amendments to Regulation 1603 to address the interested parties’ questions because the new presumption, by itself, would not result in personal liability under RTC section 6829 or the imposition of the 40 percent penalty under RTC section 6597, and would not prevent a mobile food vendor from participating in the Offers in Compromise Program.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption will be “[e]ffective July 1, 2014” and instead include new language stating that it will apply to “[s]ales made on or after July 1, 2014.” BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

November 19, 2013, BTC Meeting

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board’s November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add new subdivision (u) to Regulation 1603 which generally describes “mobile food vendors,” and provides that, “[f]or sales made on and after July 1, 2014, unless a separate

amount for tax reimbursement is added to the price of meals, a mobile food vendors' sales of taxable items are presumed to be made on a tax included basis," and provide that "[t]his presumption does not apply when a mobile food vendor is making sales as a 'caterer'" as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board's discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1603 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations. This is because the proposed amendments to Regulation 1603 are consistent with the 2001 amendments to Regulation 1574, discussed above, and there are no other sales and use tax regulations that specifically apply to mobile food vendors' collection of sales tax reimbursement. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1603 or the proposed amendments to Regulation 1603.